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EXPANDED UCMJ JURISDICTION OVER CONTRACTORS: A PAPER TIGER?

by

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Contents

	<i>Page</i>
Disclaimer.....	ii
Abstract.....	iv
Introduction.....	1
Battlefield Contractors and a Jurisdictional Gap.....	2
UCMJ Jurisdiction Over Contractors Expanded.....	3
What Changed.....	3
DoD Implementation.....	10
Is UCMJ Jurisdiction Over Contractors Constitutional.....	13
MEJA.....	17
MEJA Amended.....	19
Proposal to Strengthen.....	21
Enhanced MEJA Offers Better Path to Accountability.....	22
Conclusion.....	24
Endnotes.....	25
Bibliography.....	29

Abstract

In the wake of Abu Ghraib and other highly publicized incidents such as the alleged murder of Iraqi civilians by Blackwater employees, the call for ensuring accountability for contractors working with the U.S. government abroad reached an all time high. Many felt contractors working alongside the military overseas fell into a jurisdictional gap and escaped justice for their alleged crimes. This perception is especially troublesome in the context of counterinsurgencies, where winning the hearts and minds of the local populace is essential.

In response to such concerns, Congress expanded Uniform Code of Military Justice (UCMJ) jurisdiction over civilians by adding those serving with or accompanying the armed forces in contingency operations within its reach. In doing so Congress breathed potential life into a part of the code that has remained dormant for over 30 years. However, statutory construction, constitutionality, and DoD implementation will all serve to limit the utility of this new option for ensuring contractor accountability.

Accordingly, it is necessary to consider the potential reach of the Military Extraterritorial Jurisdiction Act (MEJA), another Congressional attempt to close the jurisdictional gap. MEJA has been amended to broaden the scope of its coverage, yet additional amendments are necessary as its coverage remains ambiguous. Additionally, MEJA's track record has been poor, indicating more priority and resources are needed within the DoJ. Still, an improved MEJA offers a more sound avenue to ensuring contractor accountability in conflicts than the UCMJ.

Introduction

For the last seven years, the United States military has been engaged in the “War on Terror” with central fronts in Iraq and Afghanistan. Counterinsurgency efforts have dominated U.S. military operations in both locations. Few would disagree that public opinion is a central battleground in these campaigns. The 2008 National Defense Strategy indicates the struggle includes a war of ideas, juxtaposing democracy and freedom against violent extremism.¹ In order to garner and maintain public support, both domestically and internationally, the U.S. must be perceived as keeping the moral high ground. Part of this effort includes ensuring accountability of U.S. forces and civilian contractors supporting those forces for any misdeeds that occur while operating abroad.

While accountability for military members serving abroad involves a straightforward application of the Uniform Code of Military Justice (UCMJ), the road to accountability for civilian contractors working alongside the U.S. military has been anything but simple. The powerfully disturbing images of Abu Ghraib in 2004 undoubtedly have left an indelible imprint on the international psyche. By holding military members involved criminally liable in court-martial proceedings, the U.S. made an important effort at restoring its public image. However, private contractors, also reportedly involved in criminal misconduct, appeared to have escaped accountability due to an inadequate legal framework. This sparked Congressional interest in considering changes in the law to close loopholes in U.S. jurisdictional coverage.

Two Congressional efforts to ensure accountability over civilian contractors operating abroad include changes to the Military Extraterritorial Jurisdiction Act (MEJA)² and UCMJ.³ The entity prosecuting the case is different depending on which statutory scheme the executive branch decides to use. MEJA is the realm of the Department of Justice while military members

prosecute violations of the UCMJ under a different court system. This paper argues that, despite the expansion of UCMJ jurisdiction over civilian contractors, the UCMJ will not be the chief vehicle to ensure criminal accountability regarding contractor misconduct. As a result, Congress must ensure MEJA is strengthened.

After a brief background on the increase of contractors on the battlefield, this paper will first look at how Congress changed the UCMJ, how the Department of Defense (DoD) plans to implement the change, and the constitutionality of the provision. Next, the paper will look at MEJA, specifically what the law covers, questions about its effectiveness, how it has changed and whether further changes are necessary.

Battlefield Contractors and a Jurisdictional Gap

While civilian involvement on the battlefield is not new, since the 1990s contractor support to military operations has become a growth industry. P.W. Singer, a foreign policy scholar, attributes such growth to a combination of factors, including increased instability since the Cold War, shrinking military budgets, and the rise of privatization.⁴ Singer emphasizes that the companies providing support come in different forms, breaking down contractor support into three main areas: military provider firms, military consultant firms, and military support firms.⁵ Provider firms, typically the most controversial, give assistance in the tactical environment and may engage in actual fighting; consultant firms provide advisory and training assistance and support firms focus on logistics.⁶ As these companies grow, they may absorb other companies with different specialties, resulting in a blurring of the lines.

The rise of contractor support is depicted well in an August 2008 Congressional Budget Office study on contractor personnel supporting operations in Iraq. The study indicated there

were at least 190,000 contractors working in Iraq for a variety of U.S. agencies, including the Department of Defense (DoD), Department of State (DoS), and USAID.⁷ The report indicated that “the ratio of about one contractor employee for every member of the U.S. armed forces in the Iraq theater is at least 2.5 times higher than the ratio during any other major U.S. conflict...”⁸ Contractors provide both services and products in Iraq. Services include “logistics, construction, engineering and technical support, linguistic services, economic development, humanitarian assistance, and security.”⁹ And products provided include “food, fuel, vehicles, and communications equipment.”¹⁰ The scope of contractor support underscores the importance of having a legal regime capable of effectively responding to contractor misconduct.

As previously stated, Congress recognized an inadequate legal framework existed and passed new legislation over the last few years to fill the jurisdictional gap. Essentially, at the time of Abu Ghraib, neither the UCMJ nor MEJA enabled prosecution of civilian contractors engaged in prison abuses. However, today a more robust capability exists. This is illustrated by the recent federal indictment that charged five Blackwater employees with voluntary manslaughter, attempted manslaughter and weapons violations for alleged misconduct in the September 2007 shootings in Nisur Square, Iraq.¹¹ A sixth employee pleaded guilty on December 5, 2008 to his role in the shootings.¹² This paper will now turn to a review of how the U.S. has strengthened jurisdiction over contractors, beginning with changes to the UCMJ.

UCMJ Jurisdiction over Contractors Expanded

What Changed

In a provision receiving little fanfare, the National Defense Authorization Act for 2007 modified Article 2(a)(10) of the UCMJ, expanding military jurisdiction over civilian

contractors.¹³ The change provides for military jurisdiction “in time of declared war or a contingency operation” to “persons serving with or accompanying an armed force in the field.”¹⁴ The addition of “a contingency operation” vastly changed the jurisdictional landscape. The previous language, which only referred to war, had been judicially construed to mean wars declared by Congress, essentially resulting in civilian immunity from military criminal prosecution for the past 38 years.¹⁵

A precise understanding of the language contained in this UCMJ section is necessary to understand the full scope of the change. First, what is a contingency operation? The U.S. Code defines a contingency operation as follows:

The term “contingency operation” means a military operation that –

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301 (a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or national emergency declared by the President or Congress.¹⁶

Accordingly, a contingency operation can be designated by the Secretary of Defense or occur by operation of law when certain mobilization conditions are met.

Next, who are persons “serving with or accompanying an armed force.” The use of “persons” in the code indicates a broad reach, encompassing DoD employees, contractors and even third country nationals. Courts have construed “serving with or accompanying” the armed forces to include situations where the contractor’s presence and activities were “not merely incidental but directly connected with, or dependent upon, the activities of the armed force or its personnel.”¹⁷ Examples have included a

maintenance contractor working on an Air Force base in Japan and contractors serving on merchant ships providing logistical support to military forces.¹⁸ One case suggested that “accompanying” goes beyond “serving with.” The case indicated that even if a contract was over and the contractor was not “serving with” an armed force, a continued connection with the military may still satisfy the “accompanying” requirement for jurisdiction.¹⁹ Typically, “accompanying” language is seen in the case of dependents while “serving with” involves contractors.

Finally, what is “in the field?” Judicial interpretations of “in the field” have favored a construction that looks at what the personnel are doing, not where they are located.²⁰ Judicial interpretations of lower courts have been fairly broad, even including training operations in the United States done in preparation for deployments to a theater of war.²¹ In essence, the analysis appears to be more of a functional one, focusing on the activities of the contractor and how it relates to operations against an adversary. Yet at least one commentator suggests that the Supreme Court may not take such a broad view of either the “in the field” or “serving with or accompanying” language today.²² For example, in *Reid v. Covert*, the Supreme Court suggested a narrower interpretation of “in the field,” which included areas of actual fighting.²³ This will be discussed further when considering the constitutionality of the application of the UCMJ provision.

Interpreter. Using the definitions above, a review of a few contemporary examples or hypotheticals may assist in understanding the new provision’s potential reach. First, take the case of the first actual UCMJ prosecution of a civilian contractor since the law was enacted. In a plea deal in June 2008, Alaa Mohammad Ali, a civilian contractor who served as an interpreter for the Army, pled guilty to several charges, including wrongfully appropriating a knife,

obstructing justice, and making a false official statement.²⁴ He was sentenced to 5 months in confinement.²⁵ Ali's service in Iraq is part of a "contingency operation" as President George Bush, on September 14, 2001 issued Proclamation 7463, which invoked a provision to call up the ready reserve.²⁶ President Bush has continued the national emergency declared in Proclamation 7463 on an annual basis since 2001.²⁷

As an interpreter for the Army in Iraq, Ali is arguably "serving with or accompanying" the armed forces. Ali reportedly assisted Army military police members tasked with training Iraqi police forces. Indeed, his work is not merely incidental but appears to directly facilitate the Army's mission of training Iraqi police officers. Further, even a narrower definition of "in the field" which focuses on proximity to hostilities, appears to be met. Here, Ali is working directly with forces charged with battling a continuous insurgency.

Blackwater. Although being prosecuted under MEJA instead, let us consider the case of the Blackwater employees that have been indicted for various offenses arising out of shootings that occurred in Nisur Square, Iraq. According to the DOJ, the Blackwater Worldwide employees were contracted by the Department of State to provide security services.²⁸ In September 2007, these contractors were assigned as part of a tactical support team, functioning to "provide backup fire support for other Blackwater personal security guards operating in the city of Baghdad."²⁹ They responded in support of another Blackwater security detail that was providing protection to a USAID member and had encountered a vehicle-borne improvised explosive device.³⁰ The indicted Blackwater employees allegedly opened fire on civilians in the area.

As indicated in the case of the interpreter, due to the applicable Presidential Proclamations, the operations in Iraq are part of a "contingency operation." Further, the "in the field" requirement is likely satisfied for the same reasons mentioned in the previous example. What is

less clear is whether the “service with or accompanying” the armed force requirement is met. The contract was with the DoS, not the DoD. Arguably then, the Blackwater employees lack a sufficient nexus with the armed forces. However, to be sure, DoS and DoD efforts in Iraq to stabilize the country are inextricably linked, bolstering the connection between the Blackwater employees and the military mission. Yet, the question remains whether such linkage is enough to allow UCMJ jurisdiction over these employees.

Hurricane Response. At least one commentator suggested that UCMJ jurisdiction might apply to a domestic emergency such as a Hurricane Katrina type response.³¹ Consider the following hypothetical. Let us assume that the President, under a Presidential Proclamation, federalized the National Guard in Mississippi to assist in responding to a hurricane. As part of the disaster relief effort, the Department of Homeland Security contracts with a private company to assist with security in order to prevent looting. A contractor with the company allegedly goes beyond the defensive use of force and kills a suspected looter. Could the new UCMJ provision apply?

First, the threshold requirement for a “contingency operation” is met by the Presidential Proclamation, which federalized the National Guard. Is the contractor “serving with or accompanying” the armed forces? Federal code defines armed forces as the army, navy, air force, marine corps, and coast guard.³² While one could argue that the contractor was serving with or accompanying National Guard members and not the “armed forces,” the stronger argument probably is that the contractor’s work meets this criterion if the National Guard members are serving in a Title 10 federal status. Assuming National Guard equals armed forces in this context, the question would be whether the contractor’s job had a sufficient nexus with the military operation. One might argue that because the contract is with DHS and not DOD, that

the requirement is not met. Yet, the military role is to stabilize and secure the devastated area. The contractor's role appears to directly relate to this military mission and therefore, arguably is sufficiently connected to the military mission to warrant jurisdiction.

Finally, is the contractor "in the field?" As previously discussed, court opinions have considered the relation of the activity to an adversary or hostilities. However, the opinions have not placed geographical limits on defining "in the field," indicating the location could be in the United States. The question becomes whether a humanitarian relief operation with a security component is enough to satisfy the "in the field" requirement. The answer is not clear. As the U.S. experience in Iraq and Afghanistan indicate, the military will be involved in missions where combat and stability operation phases occur simultaneously. Arguably the case of hurricane relief is distinguishable due to the smaller scope of the security component. But what about a foreign humanitarian operation such as Somalia, which initially focused on humanitarian efforts but then morphed into a larger security effort? If the "in the field" requirement hinges on actual conflict, how much fighting is enough to satisfy the requirement?

Predator Unmanned Aerial Vehicle (UAV). A final hypothetical explores the interaction between technological change on the battlefield and the new UCMJ provision. As technology enables more and more operations, including kinetic operations, to be conducted from remote locations, it is important to consider what constitutes the battlefield and how that may relate to legal accountability. Recent press coverage of the conflicts in Iraq and Afghanistan often cite the use of UAVs to target and destroy insurgents. Assume that the Central Intelligence Agency (CIA) has some Predator UAVs and uses contractors to operate them remotely from a military base in the United States. Suppose that the CIA is using the predator to monitor a suspected high level meeting of insurgents in Afghanistan. The meeting breaks up and its participants leave the

building, going off in a number of directions. The UAV monitors the movement of one of the suspected insurgents and eventually engages the individual with a hellfire missile, killing him. A review of the contractor's actions shows that he did not follow the proper rules of engagement; specifically he failed to ensure the requirements for positive identification of the target were met. Instead of killing an insurgent, he killed a high level Afghan official.

As discussed in the other examples, operations in Afghanistan meet the "contingency operation" requirement. Arguably the contractor's actions have enough of a link to military activities to render a status of "serving with or accompanying" the armed forces. Factors that support such an interpretation includes that the nature of the mission is indistinguishable from similar military missions and that the employee is operating remotely from a military base. As indicated earlier, an argument against may be that the contractor was not working directly for the DoD.

Whether the contractor is "in the field" is also subject to interpretation. Again, a more functional than geographic analysis would suggest the contractor is "in the field" despite operating out of a base in the United States. Here, the contractor is being used directly to engage what was thought to be a hostile in an area of conflict. If the relation of the action to operations against an adversary is the linchpin, the activity in the hypothetical supports a "in the field" status. Interestingly, it is important to point out that if the civilian that operated the predator and fired the missile was a CIA employee instead of a contractor, the analysis would not change. While the focus of this paper is on civilian contractors, the UCMJ's provision also applies to civilian employees of the federal government.

In reviewing the examples above, it becomes apparent that, absent specific definitions for "serving with or accompanying" and "in the field," the full reach of this UCMJ provision will

remain somewhat unclear and be decided on a case by case basis through judicial interpretation. In addition to judicial interpretation of key statutory language, the new provision's application will be determined by DoD implementation plans regarding the change to Article 2(a)(10).

DoD Implementation Guidance

In March 2008, Secretary of Defense Gates issued implementation guidance which represents a conservative approach to exercising this new UCMJ provision. The guidance indicates the DoD will give great deference to the DoJ, will withhold court-martial authority at very high levels, and may narrowly construe those cases in which UCMJ jurisdiction could attach.

The guidance from Secretary Gates makes clear that DoJ notification and consideration is required prior to the initiation of any court-martial charges or Article 15 proceedings.³³ The purpose of the notification is to afford the DoJ “an opportunity to determine if it intends to pursue U.S. federal criminal prosecution and to advise DoD accordingly.”³⁴ This requirement reflects a deferential approach by the DoD. In essence, only those cases that the DoJ determines it will not prosecute will be available for further DoD action. The DoJ may decide not to go forward due to insufficient evidence or because it determines federal jurisdiction under MEJA or other federal laws is inapplicable.

In the event the DoJ declines the case, the decision to go forward with a military disposition resides with the Secretary of Defense or, in some cases, a general court-martial convening authority. If the offense occurred in the United States, the accused was “not at all times during the alleged misconduct located outside the ‘United States,’” or if the case was initiated in the United States, the Secretary of Defense is the decision authority.³⁵ In other cases,

geographic combatant commanders and other commanders assigned to such commands with general court-martial convening authority will decide case disposition.³⁶ This guidance ensures that potential cases involving civilians will be scrutinized at the highest levels prior to going forward.

The guidance from Secretary Gates also emphasizes that the exercise of UCMJ jurisdiction be limited to cases of “military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice...”³⁷ He goes on to spell out such cases as those:

When U.S. federal jurisdiction otherwise does not apply or federal prosecution is not pursued, and/or

When the person’s conduct is adverse to a significant military interest of the United States (e.g., alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations).³⁸

In addition to emphasizing the deference given to the DoJ, this guidance appears to restrict the exercise of UCMJ jurisdiction to cases with a clear affect on good order and discipline or the military’s standing in the public eye. Yet, the application of this standard may not be as straightforward as one might think.

A review of some of the previous scenarios is useful in order to better understand the effect of the DoD implementation guidance. Before looking at the scenarios however, a review of how the military justice system defines conduct prejudicial to good order and discipline and conduct that is of the nature to bring discredit on the armed forces is necessary. Article 134 of the UCMJ states that “to the prejudice of good order and discipline”:

refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as

prejudicial in some indirect or remote sense; however, this article does not include these distant effects.³⁹

Further, “conduct of a nature to bring discredit upon the armed forces” is defined as follows: “‘Discredit’ means to injure the reputation of. The clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.”⁴⁰ Using these definitions as a frame of reference, the DoD implementation memo appears to focus on misconduct that has a direct affect on military operations or lowers public opinion.

Recall the case of the interpreter, whose charges related to an incident with another interpreter. Ultimately, since this case was the first and only case tried to date, the DoD obviously determined the requirements for jurisdiction were met. While he pled to lesser charges, the original allegation included assault on a fellow interpreter. The Army depended on these interpreters to communicate to the Iraqi police in order to facilitate training. Obviously this mission is jeopardized when the interpreters are fighting among each other. Arguably then the conduct was prejudicial in such a way as to have a potential effect on military operations. Alternatively, one could argue that such conduct between two civilians is fairly minor and not likely to jeopardize good order and discipline in the armed forces in any measurable way.

What about the case of the Blackwater employees allegedly firing on civilians in Iraq? Civilian casualties undermine the mission in Iraq. The public, certainly that in Iraq, will not distinguish between U.S. contractors and the U.S. military when placing blame. The image of the military is definitely damaged in such cases. The UAV scenario, which also involved a civilian casualty, would damage the military’s image for the same reasons. Accordingly, the implementation guidance could support jurisdiction in these cases.

The hurricane response example may warrant a different result. Because it involves a domestic scenario, it will likely be viewed more as a civilian police, and not a military matter. Indeed, the case involves unlawful force against a civilian like the others. The requirement for the Secretary of Defense himself to make the ultimate decision reflects the more sensitive nature of court-martialing a civilian for misconduct in the United States.

Undoubtedly the implementation guidance has a cautionary tone, suggesting that officials will require a solid military nexus before exercising jurisdiction. Yet, as a review of the scenarios indicate, ultimately the scope of the new provision's use will depend on subjective interpretations on what misconduct has enough of an effect on public opinion or good order and discipline in a given context. The constitutional history of civilian court-martials is one factor that counsels in favor of the apparent conservative DoD approach. The next section of the paper will review constitutional issues related to UCMJ jurisdiction over civilians.

Is UCMJ Jurisdiction over Civilians Constitutional?

The constitutional analysis begins with considering the basis for Congressional authority to provide for UCMJ jurisdiction over civilians. The U.S. Constitution gives Congress the power "To make Rules for the Government and Regulation of the land and naval forces..."⁴¹ Additionally, in referring to the enumerated powers of Congress such as the power to regulate the armed forces, the Constitution gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..."⁴² The debate then is how far these constitutional provisions, when taken together, extend. A review of some court decisions addressing this issue gives insight into how courts may decide future cases in which the constitutionality of the new UCMJ provision is challenged.

Ex parte Milligan is a Civil War era case that addressed military jurisdiction over civilians. In that case, the military was seeking to try a civilian in Indiana for conspiring against the Union. The Court focused on the lack of necessity in trying Milligan by military commission, stressing the open and functioning nature of the Indiana courts.⁴³ The Court also emphasized that Milligan was denied a trial by jury, a constitutional guarantee under the Sixth Amendment.⁴⁴ The Court did recognize that a situation could exist where military jurisdiction was proper, but limited that context to cases where the civil courts are closed in “a theatre of active military operations, where war really prevails...”⁴⁵

In the 1950s, the Court addressed UCMJ jurisdiction over civilians in a series of decisions. Taken together, these cases effectively ended UCMJ jurisdiction over civilians for the past 38 years. Although there are grounds to distinguish these cases from those involving contractors currently working in Iraq and Afghanistan, an analysis of these cases remains instructive as it gives insight into how the Supreme Court might view UCMJ jurisdiction over civilians today.

In 1955 the Court considered whether UCMJ jurisdiction was proper for an ex-airman that allegedly committed a murder while stationed in Korea. At the time, Article 3(a) of the UCMJ provided for jurisdiction over ex-servicemembers who committed a UCMJ offense while subject to the code, if not otherwise amenable to U.S. courts.⁴⁶ In *Toth v. Quarles*, the Court held that jurisdiction was improper, rejecting the government’s argument that jurisdiction was an appropriate exercise of the Necessary and Proper Clause by Congress’ in carrying out its power to regulate the armed forces.⁴⁷ The Court emphasized the difference between courts established under the judicial branch pursuant to Article III of the Constitution and those established by Congress under Article I to regulate military forces.⁴⁸ Such differences included provisions

ensuring the independence of judges such as fixed compensation and lifetime tenure.⁴⁹ Further, the Court stressed that military jurisdiction infringed on important due process standards guaranteed in the Bill of Rights, such as the right to a trial by a jury of peers.⁵⁰

Two years later the Supreme Court again reviewed military jurisdiction when it considered the court-martial of two military spouses for killing their husbands while stationed abroad, pursuant to a different section of the UCMJ, Article 2(11). In *Reid v. Covert*, the Supreme Court again struck down military jurisdiction, again deciding that such jurisdiction went beyond Congress' power to regulate the armed forces.⁵¹ Citing similar concerns to those expressed in the *Toth* case, the Court stressed that the spouses were not military members, and that they were denied their rights to be indicted by a grand jury and afforded a jury trial consistent with Article III, Section 2 of the Constitution and the Fifth and Sixth Amendments.⁵² The holding in *Reid* was subsequently extended to non-capital cases and cases involving civilian employees vice dependents.⁵³

Despite striking down military jurisdiction, the Court did leave room for some leeway in the interpretation of who constituted a member of the armed forces pursuant to Article I, Section 8, Clause 14 of the U.S. Constitution. The Court stated, “[w]e recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.”⁵⁴ Further the Court commented on lower court decisions that upheld military trials of civilians, focusing on situations in which civilians were “performing services for the armed forces ‘in the field’ during *time of war*.”⁵⁵ The court stressed the importance of “actual hostilities” being underway in such a situation and that the source of authority for these cases rested on the “Government’s ‘war powers.’”⁵⁶

In the Vietnam era, an important case decided by the then Court of Military Appeals appeared to sound the death knell for military jurisdiction over civilians. In *U.S. v. Avarette*, the court decided that a civilian contractor convicted of larceny and conspiracy to commit larceny was not subject to military jurisdiction under UCMJ Article 2(10).⁵⁷ Informed by the Supreme Court decisions of the 1950-60s, the court strictly construed the language of Article 2(10), reasoning that the “in time of war” language required a formally declared war.⁵⁸ Because Vietnam was not a declared war, the military lacked jurisdiction over Avarette. As there have been no declared wars since World War II, this holding effectively eliminated UCMJ jurisdiction over civilians until the recent change to Article 2(10), which now provides for jurisdiction in contingency operations.

The historic reluctance of courts to confer military jurisdiction over civilians is firmly rooted in U.S. jurisprudence. Yet, a close reading of the past cases indicates that under certain, limited circumstances, UCMJ jurisdiction over civilians may pass constitutional muster. The exact contour of such a case is not entirely clear, but a review of the past cases provides some guidance. In evaluating the new UCMJ provision, a threshold question is whether Congress has overstepped its power by conferring military jurisdiction over civilians supporting contingency operations. With *Reid*, and the subsequent cases that extended its holding, the Supreme Court indicated that Congressional power to regulate the armed forces, applied through the Necessary and Proper Clause, was insufficient to allow military jurisdiction over civilians. Instead, the Court suggested that military jurisdiction might be appropriate in a narrow set of cases where “military commanders necessarily have broad power on the battlefield.”⁵⁹ While the Supreme Court may recognize that such military exigencies exist outside a declared war, it will likely narrowly construe those circumstances in contingency operations that support military

jurisdiction. The further removed the civilian is from “actual hostilities” the less likely the Court will find such jurisdiction appropriate. Additionally, the preference for using civilian trials when available and functioning will probably preclude UCMJ jurisdiction for offenses occurring in the U.S. such as those considered in the UAV and domestic emergency hypotheticals.

The statutory requirements of “serving with or accompanying the armed forces in the field,” the DoD’s conservative approach to implementation, and constitutional concerns all serve to limit the reach of UCMJ jurisdiction over civilian contractors. Accordingly, it is necessary to consider MEJA, which represents other Congressional action aimed at ensuring accountability of civilian contractors serving alongside military members abroad.

The Military Extraterritorial Jurisdiction Act

In 2000 Congress considered the jurisdictional gap that precluded prosecution of civilians serving with or accompanying the armed forces abroad. MEJA’s legislative history indicates that Congress recognized that jurisdictional limits existed because of judicial holdings restricting UCMJ jurisdiction over civilians, the limited extraterritorial applicability of most laws and the inability or unwillingness of host-nation governments to pursue prosecutions.⁶⁰

Congress recognized that the Supreme Court cases of the 1950s and 1960s placed significant restrictions on UCMJ jurisdiction over contractors serving alongside the armed forces overseas. Congress also examined the applicability of domestic criminal law overseas and determined that few applied extraterritorially and that often the act must have occurred in “the special maritime and territorial jurisdiction of the United States,”⁶¹ or impact interstate or foreign commerce for jurisdiction to attach.⁶² With the limited ability to enforce U.S. criminal law

abroad, the U.S. left accountability with the foreign government that exercised control over the location of the crime.

The legislative history indicates Congress was unsatisfied with prosecution by host nation governments. Congress cited a DoD Inspector General (IG) report that indicated the lack of foreign interest in prosecuting crimes committed by Americans overseas. The 1999 DOD IG investigation reviewed 275 case files dealing with serious crimes, concluding that foreign governments took action in only 11% of the cases.⁶³ Congress indicated that the foreign government lacked motivation in cases in which the crime “was committed against another American or against property owned by an American or the United States Government.”⁶⁴ Further, the committee report stated that the chance of foreign action was also limited by agreements that provided for exclusive U.S. jurisdiction such as the situation in the Balkans due to the Dayton accords and contexts where no functioning foreign government existed such as Somalia.⁶⁵

As a result of the aforementioned concerns, MEJA was passed into law, allowing prosecution of “[c]riminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.”⁶⁶ The statute limits jurisdiction to those cases “punishable by more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States...”

To date, many critics suggest that MEJA has yet to live up to its potential. As of April 2008, the DoJ reported it had brought charges against only 12 people since MEJA’s enactment, although other investigations were ongoing.⁶⁷ For many, this paucity in prosecutions demonstrates MEJA’s ineffectiveness. In testimony before Congress, one scholar suggested that MEJA’s ineffectiveness was due to “an attitude of official indifference within the Department of

Justice, or at least a decision to accord these crimes very low priority and no or very little resources.”⁶⁸ From a practical standpoint, a prosecutor in a certain district is probably more interested in crimes occurring in that district than devoting scarce resources on a case occurring in Iraq or Afghanistan. Without an internal push in terms of priority from within the organization, it is unlikely such cases will be given the requisite priority. Bureaucratic inertia will keep such cases at the bottom of the pile. However this is not MEJA’s only challenge. As Congress learned a few years after the law was passed, the language of the statute itself was inadequate.

MEJA Amended in 2004

In 2000, Congress defined “employed by the armed forces” as “employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier...”⁶⁹ The term “accompanying” was defined as dependents of military members, civilian employees of DoD, or DoD contractors residing with their sponsor outside the United States.⁷⁰ However, a few years later, it became clear that MEJA needed modification.

After Abu Ghraib, it became apparent that MEJA did not adequately cover all the potential perpetrators. Because some of the interrogators working at the prison were not DoD contractors, MEJA was inapplicable.⁷¹ Congress responded by amending MEJA in the Fiscal Year 2005 DoD Authorization Act in October 2004. The amendment changed the definition of “employed by the armed forces” to now include employees, contractors, or employees of

contractors of the DoD “or any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas...”⁷²

As one commentator astutely pointed out, by failing to define “supporting the mission of the Department of Defense,” the full reach of the statute is ambiguous.⁷³ How much support is enough? Does it apply to all DoD missions? This issue is depicted well in the case of the Blackwater employees indicted for actions taken in Nisur Square, Iraq. As mentioned earlier, this case represents the first prosecution of non-DoD contractors or employees under MEJA. The question is whether these Blackwater personnel meet the requirement of supporting the DoD mission. Clearly the DoJ thinks they do as their public statement regarding the indictment states:

According to the indictment, the defendants were all employed by the Armed Forces outside the United States – that is, the defendants were employed as independent contractors and employees of Blackwater Worldwide, a contractor of the Department of State, to provide personal security services related to supporting the mission of the Department of Defense in the Republic of Iraq, within the meaning of MEJA.⁷⁴

However, a recent press report indicates that the DoD takes a more limited view of the category of people that fit within MEJA’s scope. The press report states that Deputy Secretary of Defense Gordon England wrote to Representative David Price of North Carolina in 2007 “that the contractors ‘were not engaged in employment in support of the DoD mission’ and that therefore federal prosecutors lack jurisdiction to charge the Blackwater guards.”⁷⁵ The article confirms that this remains the DoD position today.⁷⁶ So it will likely be up to the courts to decide, on a case by case basis, under what circumstances non-DoD federal contractors are supporting the DoD mission within the meaning of MEJA.

Proposal to Strengthen MEJA

In 2007, Representative David Price of North Carolina, sponsored the MEJA Expansion and Enforcement Act. The legislation broadens the coverage of MEJA to include persons “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.”⁷⁷ The legislation also calls for the establishment of a Federal Bureau of Investigation “Theater Investigation Unit” to investigate contractor crimes connected to contingency operations.⁷⁸ Finally, the legislation mandates certain reporting requirements to Congress to evaluate the effectiveness of contractor investigations and prosecutions.⁷⁹ The legislation passed the House of Representatives but the Senate has not passed the measure.

The proposed legislation seeks to respond to two main shortcomings of MEJA to date. First, by expanding its coverage, the legislation would eliminate the type of jurisdictional wrangling that may play out in the cases involving non-DoD contractors such as the Blackwater case at Nisur Square. The requirement of supporting the DoD would no longer be a point of contention. Further, the establishment of a theater investigative unit would signal an increased priority towards investigating contractor crimes, possibly leading to more effective prosecutions. Additionally, the mandated reports to Congress may provide the necessary external pressure on DoJ to ensure more resources are devoted to the issue of contractor misconduct abroad. Finally, as some have suggested, an organizational change in the DoJ may facilitate more effective handling of these types of cases. Eugene Fidell, President of the National Institute of Military

Justice, suggested in testimony before Congress that a Director of Overseas Prosecutions in DOJ be created to focus on prosecutions of citizens overseas.⁸⁰

Enhanced MEJA Offers Better Path to Contractor Accountability

An enhanced MEJA offers a more workable legal framework that facilitates contractor accountability abroad. The exercise of UCMJ jurisdiction over contractors will likely prove to be limited. The DoD, likely with an eye toward constitutional challenges, appears to have taken a conservative approach in exercising jurisdiction. Still, it is likely just a matter of time before federal civilian courts weigh in on the whether the new UCMJ provision is constitutional. Two recent court cases, *Adolph v. Gates*, and *Breda v. Gates*, provide examples of the types of cases that will be challenged on constitutional grounds. The cases also depict the deference to civilian prosecution and a reluctance to exercise UCMJ jurisdiction.

In both cases, lawyers for the petitioners have challenged the constitutionality of UCMJ jurisdiction and petitioned the United States District Court for the District of Columbia for relief under a *writ of habeas corpus*.⁸¹ Adolph is a Combat Support Associates contractor based in Kuwait that served as a mail clerk and more recently as a custodian of government property. He was allegedly being held in anticipation of larceny and false official statement charges.⁸² Breda is a KBR employee that worked at Al Asad Air Base, Iraq as a Morale, Welfare and Recreation Coordinator that was held for allegations related to a sexual assault.⁸³

In the *Adolph* case, the U.S. District Court for D.C. ordered a response from the DoJ and the DoJ responded by informing the court it will prosecute the case under MEJA, causing Adolph to dismiss his quest for habeas relief.⁸⁴ In the *Breda* case, the DoJ responded by requesting that the judge dismiss the case as moot, arguing that restrictions on Breda were

removed and he had returned to Texas.⁸⁵ This indicates UCMJ jurisdiction will not be pursued. It is unclear at the time of this writing whether the federal government will pursue a MEJA case.

Even if UCMJ jurisdiction over civilians is deemed constitutional in a future case, it will likely be so only in a narrow set of circumstances in which hostilities are ongoing. Courts may struggle to clearly define this. Consider Iraq today where U.S. forces are actively engaging insurgents in part of the country while focusing predominantly on reconstruction efforts in another part of the country. How close to the hostilities will a contractor have to be to be within the reach of the UCMJ? What about contractors in countries supporting the efforts in Afghanistan and Iraq such as those in Kuwait, like the contractor discussed above?

An expanded MEJA avoids the constitutional questions surrounding the UCMJ. However, the key will be in successfully implementing such a new provision. MEJA's track record has been poor. The legislation itself offers no panacea. Resources, cooperation with other agencies and priority by DoJ will dictate ultimate success. Yet, given the public backlash and increased Congressional attention resulting from incidents such as Abu Ghraib and Al Nisur, a favorable environment for an increased priority of effort exists.

One additional change to MEJA is worth mentioning. On its face, it only applies to felony offenses, making it less flexible than the UCMJ. Perhaps MEJA could be amended by removing the felony requirement, but giving responsibility on prosecuting such cases to military prosecutors through the Special Assistant U.S. Attorney (SAUSA) program. Currently, at many bases across the United States, judge advocates, sworn in as SAUSAs, prosecute civilians in Federal Magistrate Court for misdemeanors committed on military installations. Such a change, coupled with the expanded coverage of MEJA found in Representative Price's legislation, would allow a more uniform and consistent approach to handling contractor crime abroad.

Conclusion

The number of contractors serving alongside military members in contingency operations around the world has increased dramatically in recent years. Since 2000, Congress has made efforts to close the jurisdictional gap for contractors that commit crimes while operating abroad in support of military operations. At the most fundamental level, addressing the gap is important to ensure fairness and accountability. Simply stated, an American contractor should not be immune from prosecution because the crime was committed in a foreign country rather than the United States.

In the context of America's battle against terrorists, the relationship between accountability and public opinion has become increasingly important. For the last eight years, the U.S. has struggled with winning the war of ideas. Highly publicized incidents such as Abu Ghraib and Al Nisur provide fuel for radical extremists to further anti-American sentiment. Ensuring a proper legal framework exists to prosecute contractors serving with the military abroad helps the U.S. wage the information battle. It is one aspect of a larger information campaign that helps counter the propaganda of radical extremists in an effort aimed at positively influencing more moderate voices and preventing them from becoming extremist recruits.

The enactment of and subsequent modification of MEJA as well as the amendment of the UCMJ offer vehicles for holding contractors accountable. However, the effect of the recent UCMJ change on contractor accountability will likely be limited, making it a bit of a paper tiger. Statutory construction of the UCMJ language, constitutional concerns, and a cautious DoD approach to exercising such jurisdiction will all work to limit the use of the new provision. As a result, Congress should look to strengthen MEJA to ensure legal loopholes no longer exist to preclude the prosecution of contractor misconduct. By further clarifying and expanding MEJA's

reach and, perhaps more importantly, executing it consistently and fairly, the United States will enhance its credibility as a beacon of justice. In doing so, it helps undercut the claims of radical extremists who seek to undermine U.S. standing throughout the world.

Notes

- ¹ U.S. Department of Defense, *National Defense Strategy*, June 2008, 7.
- ² Military Extraterritorial Jurisdiction Act, Pub. L. No. 106-523, *114 Stat.* 2488 (2000) (codified at *18 U.S.C.* §§ 3261-3267).
- ³ Uniform Code of Military Justice, *10 U.S.C.* §§ 801-950.
- ⁴ P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, New York: Cornell University Press, 2003), 49.
- ⁵ *Ibid.*, 93.
- ⁶ *Ibid.*, 92-97.
- ⁷ United States Congress Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*, A CBO Paper, August 2008, 8.
- ⁸ *Ibid.*, 1.
- ⁹ *Ibid.*, 5.
- ¹⁰ *Ibid.*
- ¹¹ Department of Justice Press Release, "Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq, 8 December 2008. <http://www.usjog.gov/opa/pr/2008/December/08-nsd-1068.html>.
- ¹² *Ibid.*
- ¹³ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, *120 Stat.* 2083, 2217 (2006), codified at *10 U.S.C.* 802(a)(10).
- ¹⁴ *10 U.S.C.* 802(a)(10).
- ¹⁵ *U.S. v. Avarette*, 19 U.S.C.M.A. 363 (CMA, 1970).
- ¹⁶ *10 U.S.C.* 101 (a)(13).
- ¹⁷ *U.S. v. Burney*, 6 U.S.C.M.A. 776, 778 (CMA, 1956).
- ¹⁸ *Ibid.*; *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va 1943).
- ¹⁹ *Perlstein v. United States*, 151 F.2d 167 (3rd Circuit, 1945); UCMJ App. 21 Analysis, R.C.M. 202(a), A21-11.
- ²⁰ *Ibid.*
- ²¹ *Hines v. Mikell*, 259 F.2d, 34 (4th Cir. 1919); UCMJ App. 21 Analysis, R.C.M. 202(a), A21-11.
- ²² Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 Pub. Cont. L.J. 179, 194 (Winter 2008).
- ²³ *Reid v. Covert*, 354 U.S. 1, (1957).
- ²⁴ Multi-National Corps – Iraq Press Release No. 20080623-01, "Civilian Contractor Convicted at a Court-Martial, 23 June 2008. http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128.
- ²⁵ *Ibid.*
- ²⁶ President of the United States, Proclamation No. 7463, "Declaration of Emergency by Reason of Certain Terrorist Attacks," 66 *Fed. Reg.* 48,199 (September 14, 2001).
- ²⁷ President of the United States, "Notice – Continuation of the National Emergency with Respect to Certain Terrorist Attacks," White House Documents and Publications, August 28, 2008.

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²⁸ Department of Justice Press Release, “Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq, 8 December 2008. <http://www.usjog.gov/opa/pr/2008/December/08-nsd-1068.html>.

²⁹ Ibid.

³⁰ Ibid.

³¹ Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 Pub. Cont. L.J. 179, 185 (Winter 2008).

³² 10 USC 101(4).

³³ Gates, Robert M. Secretary of Defense. To Secretaries of Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of Combatant Commands. Memorandum, 10 March 2008.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ UCMJ, Article 134(c)(2)

⁴⁰ Ibid, Article 134(c)(3).

⁴¹ U.S. Constitution, Article 1, Section 8, Cl. 14.

⁴² Ibid, Cl. 18.

⁴³ *Ex parte Milligan*, 71 U.S. 2, 122.

⁴⁴ Ibid.

⁴⁵ Ibid, 127.

⁴⁶ *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 13. (1955).

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ *Reid v. Covert*, 354 U.S. 1. (1957).

⁵² Ibid.

⁵³ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

⁵⁴ *Reid v. Covert*, 354 U.S. 1. (1957), 22-23.

⁵⁵ Ibid, 33.

⁵⁶ Ibid.

⁵⁷ *U.S. v. Avarette*, 19 U.S.C.M.A. 363 (CMA, 1970).

⁵⁸ Ibid.

⁵⁹ *Reid v. Covert*, 354 U.S. 1. (1957), 34.

⁶⁰ U.S. House. *Military Extraterritorial Jurisdiction Act of 2000*. 106th Cong., 2d sess., 106 H.R. 778.

⁶¹ 18 U.S.C. 7.

⁶² U.S. House. *Military Extraterritorial Jurisdiction Act of 2000*. 106th Cong., 2d sess., 106 H.R. 778.

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⁶³ U.S. Department of Defense Office of the Inspector General, *Evaluation of Military Criminal Investigative Organizations' Investigative Effectiveness Regarding U.S. Forces Civilians Stationed Overseas*, Report Number 9950009I, September 7, 1999.

⁶⁴ U.S. House. *Military Extraterritorial Jurisdiction Act of 2000*. 106th Cong., 2d sess., 106 H.R. 778.

⁶⁵ Ibid.

⁶⁶ 18 U.S.C. 3261 (2000).

⁶⁷ Congressional Research Service Report for Congress. *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, 25 Aug 08.

⁶⁸ U.S. House. *Prepared Remarks of Scott Horton. Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security*, "Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq," December 19, 2007.

⁶⁹ 18 U.S.C. 3261 (2000).

⁷⁰ Ibid.

⁷¹ Major Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act (MEJA) of 2000: Rushing to Close an Unforeseen Loophole*. 2005 Army Law. 41, 43.

⁷² 18 U.S.C. 3267.

⁷³ Major Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act (MEJA) of 2000: Rushing to Close an Unforeseen Loophole*. 2005 Army Law. 41, 44.

⁷⁴ Department of Justice Press Release, "Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq, 8 December 2008. <http://www.usjog.gov/opa/pr/2008/December/08-nsd-1068.html>.

⁷⁵ Associated Press. "Pentagon Letter Complicates Blackwater Case," *Washington Post*, 3 Feb 2009, p. 7.

⁷⁶ Ibid.

⁷⁷ U.S. House. *MEJA Expansion and Enforcement Act of 2007*, 110th Cong., 1st sess., H.R. 2740.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ U.S. Senate. *Jurisdiction Over Criminal Offenses by American Civilians in Iraq and Afghanistan*, Testimony of Eugene R. Fidell, Hearing Before the Subcommittee on Democracy and Human Rights, Senate Committee on Foreign Relations, International Operations and Organizations, April 9, 2008.

⁸¹ Petitioner's Petition for a Writ of Habeas Corpus, *Adolph v. Gates*, filed 23 January 2009, U.S. District Court for the District of Columbia; Petitioner's Petition for a Writ of Habeas Corpus, *Breda v. Gates*, filed 3 February 2009 U.S. District Court for the District of Columbia (available at <http://www.caaaflog.com>).

⁸² Petitioner's Petition for a Writ of Habeas Corpus, *Adolph v. Gates*, filed 23 January 2009, U.S. District Court for the District of Columbia (available at <http://www.caaaflog.com>).

⁸³ Petitioner's Petition for a Writ of Habeas Corpus, *Breda v. Gates*, filed 3 February 2009 U.S. District Court for the District of Columbia (available at <http://www.caaaflog.com>).

⁸⁴ Show Cause Order, *Adolph v. Gates*, filed 6 February 2009, U.S. District Court for the District of Columbia (available at <http://www.caaaflog.com>); See also Voluntary Dismissal Without Prejudice of Petitioner's Petition for Writ of Habeas Corpus, *Adolph v. Gates*, filed 26

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⁸⁵ Petitioner's Petition for a Writ of Habeas Corpus, *Breda v. Gates*, filed 3 February 2009 U.S. District Court for the District of Columbia (available at <http://www.caaflog.com>); See also United States' Motion to Dismiss Petitioner's Petition for a Writ of Habeas Corpus, *Breda v. Gates*, filed 18 February 2009, U.S. District Court for the District of Columbia (available at <http://www.caaflog.com>).

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